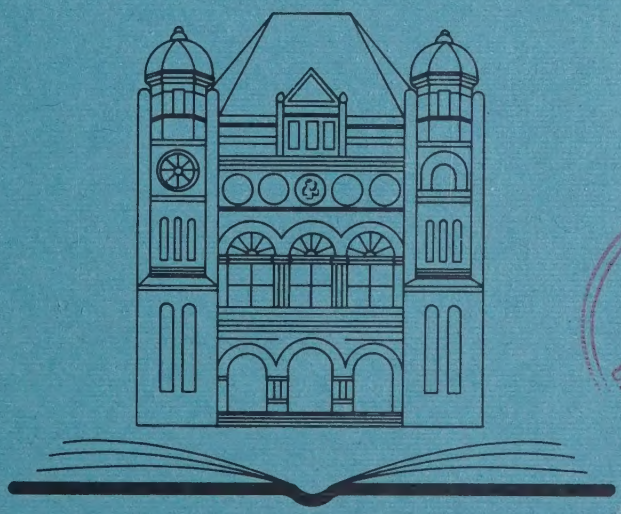
SENATE REFORM

Updated, October 1992, taking account of the Charlottetown Agreement

Current Issue Paper 113



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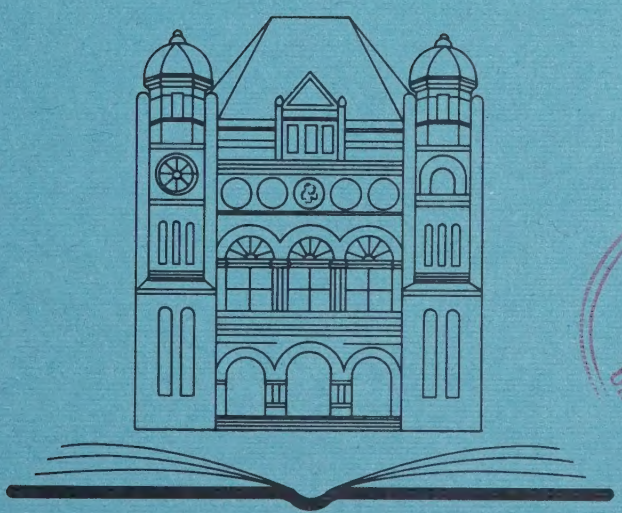

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THE ISSUE

Over the past few years, several developments have raised the public profile of the Senate and the issue of Senate Reform. These developments include the Meech Lake Accord and the companion agreement, formally known as the 1990 Constitutional Agreement, which was signed at the end of the First Ministers' Meeting in Ottawa in June 1990. The Accord among other things would have changed the method of appointing Senators and the formula for amending constitutional provisions on the Senate. It was the change in the amending formula which in fact became one of the most controversial elements of the Accord. The 1990 Agreement also proposed a national commission on Senate Reform and a possible redistribution of Senate seats in 1995. These provisions reflected long-standing provincial concerns with much of the pressure for reform coming from Western and Atlantic Canada.

The conflict between the House of Commons and the Senate over key government bills has also focused attention on the reform issue. What is the proper role of the Senate? How can it best achieve that role? During the last few months one conflict in particular -- that over the goods and services tax -- has produced what appears to be an unprecedented amount of coverage of the Senate in the media. This conflict has been accompanied by a flurry of Senate appointments, including that of Nova Scotia Premier John Buchanan, to fill longstanding and recent vacancies. It has also seen the expansion of the Senate by eight seats for the first time in its history.

This paper looks at the reform of the institution which has been receiving all this attention. In the analysis which follows, emphasis has been placed upon comprehensive proposals for change -- in particular, those proposals which have been made since the late 1970s and which deal with the substance of reform by asking such questions as: How should Senators be selected? Who should be represented in the Senate and on what basis? What powers should the Senate have?*

*This paper is designed to be read in conjunction with Current Issue Paper (CIP) #112, An Overview of the Senate: Its Purposes, Structure and Operation. As is the case with CIP #112, it covers events up to and including November 20, 1990. The Meech Lake Accord, the Senatorial Selection Acts of Alberta and British Columbia, and the procedure for amending constitutional provisions on the Senate are discussed in CIP # 112, in the section on constitutional and legislative provisions.

NEED FOR REFORM

The original purposes of the Senate included: protecting and representing regional and minority interests in national decision-making; serving as a counterweight to the popularly-elected House of Commons; and protecting property interests. As one means of meeting these purposes, the Constitution Act, 1867, conferred upon the Senate the same powers as the House of Commons, with the exception of the introduction of money bills. To this day, no bill can become law without being passed in identical form by both Houses.

Many proponents of reform argue that, notwithstanding the presence of these very extensive powers, the Senate has failed to perform what should be its primary role -- that of regional representation. As Peter Hogg has written in Constitutional Law of Canada:

> . . . the Senate has never been an effective voice of regional or provincial interests.[1]

Two reasons which have been cited for the Senate's inadequacy in this area are: (1) non-elected Senators lack legitimacy; and (2) the distribution of Senate seats gives a near majority to the two most populous provinces -- Ontario and Quebec. As a result, the other provinces do not have the means to sufficiently temper the expression of majority will in the House of Commons.[2]

Other criticisms of the Senate, some of which concern the regional representation role, have been listed by the Special Joint Committee of the Senate and of the House of Commons on Senate Reform:

> . . . the partisan nature of some Senate appointments; the poor attendance of some senators; the under-representation of women, aboriginal peoples and ethnic groups; the numerous Senate vacancies that are allowed to continue unfilled; the lack of balance in the number of senators affiliated with the different parties; the constraints that party discipline imposes on the independence of senators; and the fact that the present distribution of seats does not reflect the growth of western Canada's population.[3]

It has been stated that "Senatorships have always been among the choicest plums in the patronage basket" and that whereas judges, for instance, must be trained in law, "literally anybody who meets the qualifications set out in the constitution can become a senator."[4] Senatorships, it is claimed, are considered to be the personal gift of the Prime Minister and are largely used to reward faithful party service.

When taking these criticisms into account, proponents of Senate Reform face the challenge of combining a more effective Senate with Canada's system of responsible government. Under this system, the Cabinet is responsible to the House of Commons, not the Senate. If government policy is defeated in the House of Commons on a matter of confidence, the government must resign. A new government must be given the opportunity to command the support of the House, or an election must be called. The House of Commons, then, is clearly the supreme chamber.

PROPOSALS FOR REFORM

Recent proposals for reform range from a revamped appointment process to the election of Senators to the outright abolition of the Senate. Some of these proposals, including the 1990 Constitutional Agreement, are reviewed below.

Proposals for a different kind of appointment process were quite common in the 1970s and early 1980s. In general, they either favoured the appointment of Senators by provincial *governments* or by federal and provincial *legislators*. During the 1980s, however, the idea of an elected Senate gained widespread support; it remains the most common proposal.

In the discussion below, recommendations emanating from Ontario -- that is, from the Ontario Advisory Committee on Confederation (1978-79) and the Ontario Legislature's Select Committee on Constitutional Reform (1980) -- as well as the hearings of the Select Committee on Constitutional and Intergovernmental Affairs (1990) are highlighted.

Abolition

The concept of abolition has been supported by, among others, the New Democratic Party. In 1978, for example, Ed Broadbent, then Leader of the Party, proposed the

abolition of the Senate (described as an "unnecessary hindrance") and the addition of approximately 100 members to the House of Commons.[5] These members would be elected through a system of proportional representation. Twenty members would represent each of five regions: Ontario, Quebec, British Columbia, the Atlantic provinces, and the Prairie provinces.

Within each region, parties would nominate lists of 20 or so representatives, in addition to the candidates in the constituencies. Electors would continue to vote as at present; however, votes would be totalled by region. Parties would receive shares of the 20 regional seats equal to their shares of the regional vote.

Broadbent saw his proposal as a means of coming to grips with "serious regional discontent." It was necessary to give "the regions greater proportionate access to the direct centres of power in our political system."[6] This objective could be achieved without a Senate. Testifying before the Special Joint Committee on the Constitution of Canada, he summarized the effect of his proposal:

> . . . the cumulative impact of all these changes would be to give to our less populated regions a greatly needed genuine sense that they have greater power and efficacy in Ottawa precisely where it counts - in the House of Commons and in the Cabinet. That, in my view, would foster national unity.[7]

In 1980, Broadbent modified his proposal by suggesting the addition of 50 MPs.[8]

Reformed Appointment

House of Provinces

Appointed by the Ontario Government and chaired by H. Ian Macdonald, the President of York University, the Ontario Advisory Committee on Confederation submitted two reports -- a First Report in April 1978 and a Second Report in March 1979. The Committee proposed that the Senate be replaced by a "House of Provinces" since it was "ineffective in serving the purpose of regional representation for which it was designed."[9] Members of this new House would be appointed by, and represent, provincial governments. Appointees could include sitting members of provincial legislatures, Premiers, and Cabinet ministers.

The option of an elected second chamber was rejected by the Committee on the grounds that:

> it would create more problems than it would solve, making the existing system more complex and competing with the House of Commons and the provincial governments.[10]

The Committee acknowledged that an elected Senate with real power could perhaps provide effective regional representation. However, it "would be unlikely to give the *provincial governments* an effective voice in national policy-making."[11] [emphasis added]

Representation in the "House of Provinces" was to be based on a combination of geographic and population criteria. A total of 30 or a multiple of 30 votes could be distributed as follows:

Newfoundland	2
Nova Scotia	2
Prince Edward Island	1
New Brunswick	2
Quebec	6
Ontario	6
Manitoba	2
Saskatchewan	2
Alberta	3
British Columbia	4

The powers of the "House of Provinces" would vary depending on the degree to which proposed federal legislation affected or infringed upon regional/provincial interests. Thus, there would be no veto over legislation which was classified as having no substantial provincial interest, e.g. classifications in the federal civil service. There would, however, be an absolute veto over legislation which encroached directly on the jurisdiction of provincial governments, e.g. the use of the emergency power (which is based on the "peace, order and good government" clause of the Constitution). Finally, the "House of Provinces" would have a six month suspensive veto over legislation which was classified as having a substantial provincial interest, e.g. freight rates.[12]

Somewhat similar proposals for Senate Reform were made by, among others, the Government of British Columbia (1978), the Canadian Bar Association's Committee on the Constitution (1978), and the Task Force on Canadian Unity (1979).[13] The Constitutional Committee of the Quebec Liberal Party (1980) also proposed the

creation of an institution to be composed of delegations representing provincial governments; however, it was to be a special intergovernmental institution, rather than a legislative body.[14]

The British Columbia proposals rejected the concept of an elected Senate on the basis it would present:

> important theoretical and practical difficulties in a parliamentary system and, more importantly, is unlikely to be conducive to the effective performance of the main function of the Senate - regional representation.[15]

It was felt, for instance, that there might be confusion as to which House the executive was responsible. Another concern was that national party interests would likely dominate other interests in an elected Senate.

A recent assessment of some of the proposals for a House of Provinces concluded that:

> there were . . . two quite different thrusts in the proposals - first, for an altered system of representation [in the central institutions of the Canadian political system], and second, for improving the working of the federal system.[16]

Selection by Legislators

Another approach to the appointment of Senators involves the participation of the House of Commons and the provincial legislatures. Unlike the House of Provinces proposals, Senators would not be appointed by provincial governments. But neither would they be chosen by means of popular election. An example of this approach is found in the October 1980 report of the Ontario Legislature's Select Committee on Constitutional Reform.

The Committee recommended that half the membership of the Senate from any particular province be chosen by the House of Commons after a federal general election. The other half would be selected by the provincial legislature, following a general election in the province. The Report continued:

> In each case, the allocation of seats shall be made, so far as is practicable, in proportion to the popular vote received in the province by those political parties contesting the election in question and electing at least one member to the legislature. Members from the Territories shall be selected by the Governor General-in-Council after the election of the territorial councils.[17]

The Committee wished representation in the Senate "to fairly reflect regional aspirations and interests."[18] The following distribution of seats was suggested:

Atlantic		30
Newfoundland	6	
Prince Edward Island	4	
New Brunswick	10	
Nova Scotia	10	
Ontario		26
Quebec		30
West		26
Alberta	10	
Saskatchewan	8	
Manitoba	8	
British Columbia		12
Territories		2
Northwest Territories	1	
Yukon	1	
	TOTAL	126

The concept of British Columbia as a separate region was not new. The 1978 constitutional proposals of the Government of British Columbia allocated 20 percent of the seats to a "Pacific" region, consisting only of British Columbia.

The Committee recommended that the Senate have powers to protect legitimate regional/provincial interests and to improve federal-provincial relations. An absolute veto was not considered necessary. Instead, the Senate would be given a suspensive veto of short duration, after which a bill would have to be considered once more in the House of Commons.

In June 1978, the federal government had introduced Bill C-60, which contained provisions very similar to the Ontario Committee's recommendations. In an explanatory document on the bill, the government answered the question "Why not have direct elections for the House of the Federation [the chamber to replace the Senate]?" Part of the answer read:

> Having two elected Chambers could confuse the issue of where ultimate responsibility should lie, and always leave questions open about the supremacy of the House of Commons.[19]

This document also addressed the question "Why not let provincial legislatures choose all the members?" by responding:

> If the new House is to function as intended, it must express regional viewpoints - not only those of the provincial legislatures but also of the members of the federal Parliament who themselves represent Canadians of every region.[20]

Bill C-60 established a special procedure for "measures of special linguistic significance." They required approval by a majority of English-speaking and a majority of French-speaking members of the House of the Federation. If such approval was not forthcoming, they could not become law without being passed by the Commons again, this time by a two-thirds majority.[21]

The proposals in Bill C-60 received little public support. In December 1979, the Supreme Court of Canada held that parts of the bill were unconstitutional. Parliament alone could not enact legislation changing the powers of the Senate, the representation of each province, and the method of selecting Senators.[22]

Elections

As noted earlier, during the 1980s, the focus of the discussion on Senate Reform shifted to the idea of an elected Senate. As recently expressed at a National Conference on Senate Reform:

> In 1978, the idea of creating a House of the Provinces was clearly the front runner. Now it is no longer a live proposal; most of the support for it has vanished.[23]

David Elton and Peter McCormick, Professors of Political Science at the University of Lethbridge, explain the change in focus as a recognition that:

> while the provincially appointed "House of Provinces" model would effectively provide for the integration of federal and provincial policies

> (something which could equally well be accomplished through such intergovernmental devices as First Ministers' Conferences), it would not as effectively represent regional concerns and interests within the national policy making process. . . . the most logical way to represent the regional concerns of people based upon their place of residence is, in a democratic country, through the process of direct and open elections.[24]

The most common version of the proposals for an elected Senate is that of the "Triple-E" Senate. The concept has received the support of several provincial governments and, at the federal/regional party level, has been endorsed by the Reform Party.[25] It refers to a Senate (1) that is *elected* directly by the people; (2) where there is *equal* representation for all provinces regardless of population; and (3) that is *effective* in the representation of regional interests.

Bert Brown, the chairman of the Canadian Committee for a Triple E Senate, testified before the Ontario Legislature's Select Committee on Constitutional and Intergovernmental Affairs that:

> . . . the most important thing that might be achieved by a Triple E Senate is the perception of fairness, if not even the reality.[26]

He stressed that the West and the Atlantic Provinces "do not wish to always win, or even to always automatically oppose the centre."[27] They wanted only to be heard with some real chance of having influence in national policy.

Although proponents of the "Triple-E" Senate agree on the definition given above, they would not all implement the concept in the same way. An example is the interpretation of the word "effective", as reflected in the relationship between the Senate and the House of Commons. A report prepared for the Canada West Foundation proposed that with regard to ordinary legislation, the House of Commons should be able to override Senate amendments by an "unusual majority."[28] The Alberta Committee on Senate Reform would allow the House of Commons to override Senate amendments to most bills by a vote that was greater in percentage terms than the Senate's vote to amend.[29] The Government of Newfoundland favours a Senate with an absolute veto - and not just a suspensive veto - over almost all legislation passed by the Commons.[30]

For some proponents of reform, one of the three "E's" -- the "E" for "equality" -- has a theoretical attraction, but is not seen as realistic in Canada. It is pointed out, for example, that Canada recognizes two official languages and that approximately 85 per cent of those whose mother tongue is French reside in Quebec. Gordon Robertson, a former secretary to the federal Cabinet, writes:

> It would not be in accord with Canadian reality, Canadian history or the basic principles of federalism to expect that Quebec, with its enormous proportion of the French-speaking population of the country, could accept a reduction to 10 per cent of membership in the Senate.[31]

Five of the more significant proposals for an elected Senate are summarized below. These summaries do not deal with sub-issues, such as the method of election, the design of constituencies, and the term of office, which are beyond the scope of this paper. The sections in the summaries on powers emphasize legislative powers.[32]

Report Prepared for the Canada West Foundation (1981)[33]

Election

- An elected Senate would help to resolve the problem of effective regional representation in Canada.
- The reason for proposing an elected Senate is not the alleged unacceptability of an appointed body in a democratic age. The Cabinet in a parliamentary system, for instance, is not elected; neither is the Supreme Court of Canada.
- It is the practical and immediate implications of election which justify an election procedure. An individual who holds a Senatorship as a result of an election has a clear mandate to represent those people who elected him or her.
- An elected Senator would possess a leverage for achieving concessions on behalf of his or her region.

Representation

- Each province should be equally represented in the Senate by a total of from 6 to 10 Senators. The two territories should each elect 1 or 2 Senators.
- The most practical and meaningful application of the concept of "region" in the Canadian political context is the "province".

- An elected Senate in which the provinces were not equally represented would not be organized specifically or explicitly for the purposes of representing and protecting regional concerns.

Powers

- The Senate should have sufficient power and credibility to force greater regional sensitivity in national policy. However, the principle of the ultimate supremacy of the House of Commons should not be undermined. The Government of Canada should not be responsible to both Houses in the sense of requiring the confidence of both to survive in office.
- With regard to ordinary legislation, the House of Commons should be able to override the negative vote of the Senate by repassing the rejected legislation by an "unusual majority". Note: The Report did not give a precise definition of "unusual majority." It did say that under normal circumstances the government would be obliged to obtain the support of at least one opposition party to muster the requisite margin in the Commons.
- On matters that are of special regional sensitivity, the Senate should possess an absolute veto. Constitutional amendments would fall in this category.
- Money bills should be initiated only in the House of Commons.
- A Standing Joint Reconciliation Committee should be created to attempt to settle disagreements between the Senate and the House of Commons by the formulation of mutually acceptable compromises.

Report of the Special Joint Committee of the Senate and of the House of Commons on Senate Reform (1984)

Election

- An elected Senate is the only kind of Senate that can adequately fill what should be its principal role - the role of regional representation.
- A reformed appointed Senate would lack the political mandate to fill this role.

Representation

- The less populous provinces merit a stronger voice in Parliament. However, a system of equal representation in the Senate would tilt the balance too far and would be unacceptable to the vast majority of Canadians. Under such a system, five provinces with as little as 13.4 percent of Canada's population would have a majority of seats if they had the support of the territories.
- Ontario and Quebec should retain the same number of seats that they have now (24). The other provinces should be given 12 seats each, with the

exception of Prince Edward Island, which should be given 6. The Yukon and Northwest Territories would both have increased representation - 2 and 4 seats, respectively. This formula would produce a Senate with 144 members.

Powers

- The Senate should have significant powers, but it should not be able to undermine Canada's well-tried system of responsible government. Accordingly, as a general rule, it should be given only a suspensive veto, which would allow time for national debate and reflection, but which the Commons could, after a suitable lapse of time, override by repassing the legislation in question. The Senate should not be able to overturn a government.
- The suspensive veto would be for a maximum of 120 sitting days.
- The principal reason for rejecting an absolute veto is the possibility, if not the probability, of our parliamentary institutions continually becoming deadlocked.
- The prohibition against introducing money bills in the Senate should be maintained, with exceptions for the Senate's internal operations.
- The Senate should have no power over appropriation bills. Even a suspensive veto would amount to giving it a disguised power to overturn the government.
- To ensure additional protection for the French language and culture, measures having linguistic significance should be subject to a special voting procedure. They must be approved by a double majority -- that is, by a majority of francophone Senators and by a majority of all Senators. For these measures, the Senate would have an absolute veto.

Report of the Alberta Select Special Committee on Senate Reform (1985)

Election

- Only a directly-elected Upper House can have the trust of the Canadian people.
- An elected Senate would allow for effective regional representation.
- Modern democratic society limits the power and authority of a non-elected body.

Representation

- Each province should be represented by an equal number of Senators.
- Altogether, there should be 64 Senators, 60 representing the provinces and 2 representing each territory.
- Only a Senate with equal numbers from each province will uphold the principle of provinces being equal partners in Confederation.

Powers

- Senators should have powers which allow them to be effective in providing the regional voice envisioned by the Fathers of Confederation.
- The Senate should have the power to amend or veto any bill. A supply bill, however, should not be subject to a veto.
- The House of Commons should be able to override any amendment (veto) passed by the Senate on a bill other than a money or taxation bill, by a vote that is greater in percentage terms than the Senate's vote to amend. Thus, if a vote is passed by 60 percent in the Senate, the House of Commons must override it by a minimum of 60 percent plus 1 percent. This procedure ensures the supremacy of the House of Commons, but that supremacy can only be utilized where it is clear that representatives elected on a representation by population basis are very united.
- In the case of money or taxation bills, the House of Commons should be able to override a Senate veto by a simple majority.
- The Senate should not have the power to initiate a money or taxation bill. It should, however, be empowered to initiate supply resolutions as they might relate to the Senate's own needs.
- As a means of protecting language and cultural rights, all changes affecting the French and English languages in Canada should be subject to a "double majority" veto -- that is, a majority of all Senators combined with a majority of French-speaking Senators or English-speaking Senators, depending on the issue.
- The Senate should retain the existing 180-day suspensive veto over constitutional issues. The current constitutional amending formula ensures that the interests of the provinces will be protected.

Report of the Royal Commission on the Economic Union and Development Prospects for Canada (1985) - (the Macdonald Commission)[34]

Election

- One reason for electing Senators is the recognition that the Senate is part of Parliament and Parliament is pre-eminently a representative body. The Senate must provide the regional representation lacking in the House of Commons.
- Appointment of members by the national executive is inappropriate in our democracy.

Representation

- Representation in the Senate should be weighted in favour of the less populous regions. However, each province should not have equal representation, for the Senate should only temper, not obstruct, representation by population.

- A 144-member Senate would have the following composition: Ontario and Quebec -- 24 Senators; Prince Edward Island -- 6 Senators; all other provinces -- 12 Senators; Yukon and Northwest Territories -- 2 and 4 Senators, respectively.

Powers

- The Senate should have sufficient powers to temper, on regional grounds, the legislative majority of the House of Commons.
- The Senate should have a suspensive veto of 6 months on all ordinary legislation.
- Legislation with linguistic significance should require the support of both a majority of the Senate and a majority of francophone members. The Senate veto in such matters would be absolute, and not just suspensive.

Newfoundland's Constitutional Proposal: "An Alternative to the Meech Lake Accord" (1989)

Election

- The current selection process and distribution of seats have undermined the legitimacy of the Senate.
- An elected Senate is one of the necessary reforms, if the Senate is to perform the role originally intended for it.

Representation

- Each province should have the same representation in the Senate - 6 Senators. Consideration, however, could be given to maintaining the size of the Senate by requiring 10 members for each province.
- In every federation, there are two essential equalities: (1) the equality of each citizen; and (2) the equality of each constituent part (state or province) in its status and rights as a constituent part. The first equality is given a voice in the legislative chamber elected on the basis of representation by population - in Canada, the House of Commons. The second equality is given a voice in a second legislative chamber in which there is equal representation from each constituent part. In Canada, this second chamber should be the Senate.
- Representation in the Senate should be an incident of provincehood.

Powers

- The Senate should have sufficient powers to assure all regions of Canada an equitable role in national decision-making.

- The Senate should have an absolute veto over all legislation passed by the House of Commons, with the exception of appropriation bills (for the ordinary annual essential services of government).

- Neither the defeat of a government bill, motion, or resolution in the Senate nor a specific confidence motion in the Senate should constitute a vote of non-confidence in the government so as to require the government's resignation.

- Appropriation bills (for the ordinary annual essential services of government) and taxation bills should originate in the House of Commons only.

- A Joint Standing Reconciliation Committee should be established for the purpose of reconciling differences between the two Houses.

- Canada has a third equality -- namely, the equality of the two founding linguistic cultures. In order to give effect to this equality, constitutional amendments affecting linguistic or cultural rights or the civil law system within Quebec should be subject to a special voting procedure in the Senate. This procedure would divide the Senate into linguistic divisions, as follows:

(1)	English Division	provinces in which English is the provincial official language;
(2)	French Division	provinces in which French is the provincial official language;
(3)	Other Divisions	each province where, by constitutional provision, both English and French are provincial official languages will constitute a separate Division.

  The constitutional amendments would have to be approved by a majority of the whole Senate and a majority in each linguistic division of the Senate. Thus, each of the two founding linguistic groups would have a veto.

  By providing that each officially bilingual province would constitute a separate Division, there would be an incentive for more provinces to become officially bilingual.

- The current 180-day suspensive veto over constitutional matters should be replaced by an absolute veto.

Improvements to Existing System

Another approach to Senate Reform would see the maintenance of the present system, but with so-called "improvements". Some of the areas mentioned for possible improvement by one Senator are:

- the tenure of Senators to the age of 75. A compromise is necessary between the benefits of continuity in the Senate and the desirability of renewing the personnel;

- the weak attendance rules. The requirement to attend at least one sitting in two consecutive sessions contributes to the negative image of the Senate;
- the limited accountability to the public for work done. Senatorial salaries could be tied directly to the performance of Senate business;
- the short work week. By adhering to the Rules which provide for a five-day work week, more could be accomplished.[35]

1990 Constitutional Agreement

The 1990 Constitutional Agreement was signed by the First Ministers in Ottawa in June 1990 prior to the deadline for the passage of the Meech Lake Accord. As outlined below, the Agreement expressed a commitment to the option of an elected Senate and authorized what might be termed a "conditional" redistribution of Senate seats.

Under the Agreement, the process of Senate Reform was to involve the establishment of a national commission "with equal representation for each province and an appropriate number of territorial and federal representatives."[36] The commission would conduct hearings and submit a report that gave effect to the following objectives:

(1) an *elected* Senate;

(2) more *equitable* representation of the less populous provinces and territories; and

(3) *effective* powers. The Agreement stipulated that the Senate's powers should:

   (a) ensure the interests of residents of the less populous provinces and territories figure more prominently in national decision-making;

   (b) reflect Canadian duality; and

   (c) strengthen the federal government's capacity to govern on behalf of all citizens.

   At the same time, the responsibility of the Government to the House of Commons had to be preserved.[37]

If comprehensive Senate Reform was not achieved by July 1, 1995, a redistribution of seats would take place. Six Ontario Senate seats and two each from New Brunswick and Nova Scotia would be reallocated so as to provide two additional seats to each of the following provinces: Newfoundland, Manitoba, Saskatchewan, Alberta, and British Columbia.

During its hearings on the Agreement, the Ontario Legislature's Select Committee on Constitutional and Intergovernmental Affairs heard that Ontario had played a "pivotal" role on the Senate Reform issue at the First Ministers' meeting. The Province proposed the national commission concept; in addition, Committee members were told that the "Ontario commitment" regarding Senate seats helped to achieve a consensus at a time when the conference was on the verge of breaking down.[38]

A member of the Ontario delegation testified that this commitment was not simply a ploy or giveaway to get an agreement. Rather, it "was intended as a sign of good faith to the doubters in other parts of the country that Ontario meant business in terms of full-scale reform."[39] He noted that four different models of redistribution were considered. The advantages of the model selected were:

- It did not increase the number of Senators, thereby avoiding any cost to the taxpayer;
- It provided a measure of equitability. With the exception of the smallest and two largest provinces plus the territories, all provinces would be equally represented in the Senate;
- The difference in representation between Ontario and Quebec gave some recognition to Canadian duality;
- Because the proposal dealt only with representation, it left an incentive for full-scale reform.

Some witnesses, however, opposed the Senate Reform provisions. One criticism was the lack of public consultation prior to the decision to reallocate Senate seats. Another objection held that the outcome of the commission hearings was predetermined by the contents of the First Ministers' Agreement and by the composition of the commission. One group, in fact, concluded that "the entire process is rigged from beginning to end."[40] It recommended that any proposed commission had to include representatives of women, aboriginal peoples, visible minorities, the disabled, and cultural minorities. It also favoured a provision in the Constitution guaranteeing women and other disadvantaged groups representation in the Senate in proportion to their presence in the population of Canada.[41]

In its report the Constitutional Committee recommended that the Ontario Legislature ratify the 1990 Constitutional Agreement, which indeed occurred on June 20, 1990. A

further recommendation stated that "the Province of Ontario [should] remain committed to meaningful Senate reform."[42] The Committee specifically mentioned the commission concept as one way of providing for significant public input and stressed that all Canadians should have confidence in the commission's ability to fulfill its mandate.

In his dissenting opinion, Bud Wildman, MPP wrote that the limited time frame (June 11-20) within which the Committee operated made it impossible to canvass the opinions of Ontarians on the import of the proposals for Senate Reform in a comprehensive or responsible manner. He believed that the Committee had no way of predicting the significance of the loss of the six Senate seats. "At the very least, this aspect of the First Ministers' Agreement requires more scrutiny and public debate in Ontario."[43]

Ontario Developments

Discussion Paper

In February 1990, the Attorney General of Ontario released a discussion paper entitled Rethinking the Senate. This paper did not seek to provide a perspective or position on behalf of the Ontario government; rather, its intent was to identify a range of possible issues that surrounded the current interest in Senate Reform.

The paper acknowledged that:

> . . . the Senate is now widely regarded as an anachronism in Canada's political system. There is a consensus that the Senate should not continue in its present form . . . .[44]

In considering what a reformed Senate could or could not achieve, the paper noted that second chambers were optional in that parliamentary government did not require two assemblies; they were distinctive in the sense that they represented interests not adequately represented in the lower house; and, because they acted as a constraint on the population-based lower house, they were "secondary". Although there had been an historic failure of the Senate to promote regional accommodation, other constitutional, parliamentary, and intergovernmental mechanisms had emerged to address this failure in part. The most significant of these mechanisms were:

- the constitutional division of powers;
- First Ministers' Conferences;
- intergovernmental contacts and negotiations at ministerial and bureaucratic levels;
- regional balance in Supreme Court of Canada appointments;
- measures to promote fiscal equity across regions in Canada;
- the tradition of powerful regional spokespersons in Cabinet; and
- regionalism expressed through the party system in Parliament - that is, advocacy of regional interests within parties.

It was recognized, however, that regional interests might be better articulated within a regionally-based second chamber, notwithstanding arrangements such as the above.

The discussion paper then pointed out that Senate Reform could not be assessed solely on the basis of its capacity to improve regional accommodation. An assessment had to be made as well of the effect upon (a) the basic values of Canadian society; (b) the structure of parliamentary government; and (c) the federal system. Finally, thought had to be given to possible unintended consequences of Senate Reform, especially the influence of political parties in a reformed Senate.

Constitutional Committee

The above paper was released just prior to the initiation of hearings on Senate Reform by the Legislature's Select Committee on Constitutional and Intergovernmental Affairs. The Committee had been established in December 1989 "in anticipation of a First Ministers' Conference on Senate Reform tentatively scheduled for November 1, 1990, to undertake a programme of consultation . . . ."[45] Subject to the proclamation by June 23, 1990 of the Meech Lake Accord, it was to complete this programme of consultation on Senate Reform and present a report to the House by October 15, 1990.

During the period February - May 1990, the Committee conducted hearings in Toronto and Ottawa. These hearings were designed to give Members background information on the complexities of Senate Reform. Accordingly, the witnesses were principally Senators and academics.[46] The next phase was to encourage submissions from the public.

As is the case with various sub-issues on Senate Reform (such as possible methods of electing Senators), a summary of the testimony before the Committee is beyond the scope of this paper. Most witnesses addressed several issues, speaking not only to the issues of selection, representation, and powers, but also to the role of parties in a reformed Senate. Thus, some of the questions raised were: Was it naive to contemplate a reformed Senate of Independents? If so, how could the role of parties be minimized? Alternatively, should the objective be the accommodation, rather than the bypassing, of parties -- in other words, the strengthening of parties and the bringing of appropriate regional views into them?

Most witnesses commented, as well, on how Senate Reform might affect the parliamentary and federal systems. What, for example, would be the consequences of reform for federal-provincial relations, the Legislatures, the Premiers, the federal Cabinet, and the House of Commons? Reform, then, had to be considered in the context of Canada's entire system of government.

On June 28, 1990, following the death of the Meech Lake Accord, the Committee's terms of reference were substantially changed. Instead of consulting and reporting on Senate Reform, the Committee was "to consider and report on alternatives that would provide for more effective processes for constitutional discussions."[47] This change in mandate was not surprising when one considers that the tabling of a Committee report on Senate Reform was subject to the proclamation of the Accord. The Committee had raised the issue of process in its report on the 1990 Constitutional Agreement, recommending that the first business of a Standing Committee on the Constitution be "the development of a model process for Ontario for the consideration of constitutional amendments in Ontario."[48] The process issue had also been raised in the 1988 Report of the Legislature's Select Committee on Constitutional Reform.[49]

When the terms of reference were changed, the Committee had not had time to complete any kind of report on Senate Reform.

FUTURE OF SENATE REFORM

Two days after the death of the Accord and the 1990 Agreement, Premier Peterson told the Legislature that:

> the process of constitutional reform has for the foreseeable future come to an end. Unfortunately, we will not be able to proceed with initiatives in areas that we supported, such as Senate reform and aboriginal rights. There is no longer any reason for the select committee on constitutional reform to continue its hearings on the Senate reform issue.[50]

That same day Premier Getty of Alberta was reported as saying:

> Senate reform is dead and that's a real sense of loss.[51]

Two days earlier Premier Bourassa of Quebec had announced the Province's refusal to participate in discussions on Senate Reform:

> The Quebec government does not accept a return to the negotiating table at the constitutional level. There is no question of discussing Senate reform.[52]

In Ottawa the Prime Minister commented that there was "much to reflect on before we try again to amend the Constitution."[53] His remarks were echoed by Senator Lowell Murray, the Federal-Provincial Relations Minister, who said that any attempt at constitutional reform had been shelved "indefinitely".[54]

The issue of Senate Reform, however, has not disappeared. British Columbia, for instance, has passed a Senatorial Selection Act. Explaining the bill in a letter to the Prime Minister, Premier Vander Zalm wrote in July that major Senate Reform had been British Columbia's number one constitutional priority since at least 1976.[55]

The reform issue has also been raised by the dispute between the Senate and the House of Commons over the goods and services tax and the resulting enlargement of the Senate. Referring to this dispute, James Horsman, Alberta's Intergovernmental Affairs Minister, predicted that "in the long term, it will bring to the attention of Canadians the necessity of moving to real Senate reform."[56] Another development -- the appointment of Nova Scotia Premier John Buchanan to the Senate in the midst of an RCMP investigation into allegations of wrongdoing by Buchanan and his government -- has according to one newspaper headline had a similar effect, "breath[ing] life into [the] crusade" for reform.[57]

In October the Speech from the Throne in Manitoba revealed the government's intention to establish a task force which would invite public comment on Senate Reform and other constitutional matters. The Manitoba Government identified itself as "a strong proponent of an Equal, Elected and Effective Senate as one element of a renewed constitutional agreement."[58]

This month the Prime Minister announced the creation of a citizens' forum on Canada's future. Members of the Commons were told that the future of Canada depended upon the answers to some very simple, but very important questions. One such question was:

> What reforms should we make so that parliamentary institutions, including the Senate, work better and reflect the interests of all Canadians, rural and urban, west and east, and north?[59]

Canadians would be invited to discuss, amongst other matters, "how to ensure that the country's institutions, particularly Parliament, designed in the 19th century, will work effectively and well in the 21st century . . ."[60]

Thus, the issue of Senate Reform remains on the constitutional agenda, but with some qualifications. The 1990 Constitutional Agreement, which categorized the issue as "the key constitutional priority until comprehensive reform is achieved," has died; Quebec will still not participate in constitutional discussions with the other provinces; and there will apparently be no federal initiative on Senate Reform until the citizens' forum headed by Keith Spicer has completed its work. These factors affect the short-term prospects of reform but, as the above discussion indicates, the issue continues to be important and is certainly far from dead.

FOOTNOTES

[1]Peter W. Hogg, Constitutional Law of Canada, 2nd ed. (Toronto: Carswell, 1985), p. 201. As illustrations of the need for an effective regional voice in Parliament, Western proponents of Senate Reform frequently refer to the National Energy Program and the awarding of the CF-18 maintenance contract to a Montreal company.

[2]Hon. Lowell Murray, Keynote Address, in The Canadian Senate: What is to be Done?: Proceedings of the National Conference on Senate Reform, May 5-6, 1988 (Edmonton: University of Alberta Centre for Constitutional Studies, 1989), p. 5.

[3]Canada, Parliament, Special Joint Committee of the Senate and of the House of Commons on Senate Reform, Report (Ottawa: Supply and Services Canada, 1984), pp. 8-9.

[4]Norman Ward, Dawson's The Government of Canada, 6th ed. (Toronto: University of Toronto Press, 1987), p. 156.

[5]Canada, Parliament, House of Commons, Debates: Official Report, 30th Parliament, 3rd Session (27 June 1978): 6794-6795; and Canada, Parliament, Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, "Proceedings" (15 August 1978): 84-85.

[6]Special Joint Committee on the Constitution of Canada, p. 84.

[7]Ibid., p. 85.

[8]"Won't rush to add seats to Commons, Liberal Party says," Globe and Mail, 26 February 1980, p. 1. At its 1989 federal convention, the NDP adopted a resolution that a proposed Party committee on the Constitution look at options to promote better regional representation in Parliament. One of the options was an elected Senate. The preamble to the resolution referred to the Party's longstanding policy in favour of abolishing the Senate. Resolution N.1.6.

[9]Ontario, Advisory Committee on Confederation (H. Ian Macdonald, Chair), First Report (Toronto: The Committee, 1987), p. 7.

[10]Ibid., p. 8.

[11]Ontario, Advisory Committee on Confederation, Second Report: The Federal-Provincial Distribution of Powers (Toronto: The Committee, 1979), p. 70.

[12]Ibid., pp. 71-72.

[13]British Columbia, Executive Council, "Reform of the Canadian Senate," Paper No. 3, in British Columbia's Constitutional Proposals: (British Columbia: The Council, 1978), pp. 29-42; Canadian Bar Association, Committee on the Constitution, Towards a new Canada (Montreal: Canadian Bar Foundation, 1978), pp. 37-46; and Canada, Task Force on Canadian Unity (Jean-Luc Pepin and John Robarts, Co-chairs), A Future Together: Observations and Recommendations, vol. 1 (Hull: Supply and Services Canada, 1979), pp. 96-99 and 128-129.

[14]Constitutional Committee of the Quebec Liberal Party, A New Canadian Federation (n.p., 1980), pp. 51-56. This new institution - to be called the "Federal Council" - would be responsible for ratifying "all central government proposals affecting the fundamental equilibrium of the federation," such as the use of the federal emergency power (p. 53). The Committee formally recommended the abolition of the Senate and favoured the study of a system of proportional representation in the House of Commons (p. 47).

[15]British Columbia, Constitutional Proposals, p. 35.

[16]Dr. Peter Leslie, Address on House of Provinces Concept, Proceedings of National Conference on Senate Reform, p. 84. Dr. Leslie commented "that there were concerns arising from the conviction that central powers were excessive, and in particular, that there was a danger in a situation where the federal government or Parliament could override, or in some way infringe upon, provincial powers." There was the intention, then, "to redress the balance of a lopsided federal structure" (p. 84).

[17]Ontario, Legislative Assembly, Select Committee on Constitutional Reform, Report (Toronto: The Committee, 1980), p. 15.

[18]Ibid.

[19]Government of Canada, The Constitutional Amendment Bill, 1978: Explanatory Document, 1978, p. 23.

[20]Ibid. p. 19.

[21]Bill C-60, Constitution Amendment Act, 1978, 3rd Sess., 30th Parl. 26-27 Eliz. II, 1977-78 (first reading 20 June 1978), s. 69.

[22]Re: Authority of Parliament in Relation to the Upper House, [1980] 1 S.C.R. 54.

[23]Leslie, p. 82.

[24]David Elton and Peter McCormick, Democracy on the Installment Plan: Electing Senate Nominees (Calgary: Canada West Foundation, 1989), pp. 13-14.

[25]In May 1988, for example, at the Western Premiers' Conference in Parksville, British Columbia, the Premiers of British Columbia (Vander Zalm), Alberta (Getty), Saskatchewan (Devine), and Manitoba (Filmon) unanimously endorsed the principles embodied in the "Triple-E" concept. In a communiqué entitled "The Parksville Accord," the Premiers agreed that "an Effective, Equal and Elected Senate would provide the basis for a more representative national Parliament." Western Premiers' Conference, "Unanimous Support for Triple E Senate: The Parksville Accord," Communiqué No. 12, Parksville, British Columbia, May 18-21, 1988.

Prior to this conference, in May 1985 the Alberta Legislative Assembly had unanimously approved in principle the Report of the Alberta Special Committee on Senate Reform (Strengthening Canada) which had recommended a "Triple-E" Senate. In March 1987, the Assembly reiterated its support for the concept by unanimously confirming the recommendations in the Report. See Alberta,

Legislative Assembly, Journals, 20th Legislature, 3rd Session (27 May 1985): 119-120; Votes and Proceedings, 21st Legislature, 2nd Session (10 March 1987): 13. Following the Premiers' Conference in Saskatoon in August 1988, the Alberta Government formed a task force to consult the other provinces and the federal government on the "Triple-E" concept.

On a nongovernmental level, a few months prior to the Premiers' Conference the Reform Party had endorsed the "Triple-E" concept in its "Draft Constitutional Amendment to Reform the Senate of Canada" (17 May 1988).

[26]Ontario, Legislative Assembly, Select Committee on Constitutional and Intergovernmental Affairs, Hansard: Official Report of Debates, 34th Parliament, 2nd Session (30 May 1990): C-32.

[27]Ibid., p. C-29. Brown did not believe that a "Triple-E" Senate would prevent another National Energy Program in its entirety. However, if such a bill were introduced, a "Triple-E" Senate would see Alberta Senators lobbying Senators from provinces and territories which had energy interests. The objective would be to build a majority in the Senate. Members of the Commons would be told that "if you come forward with another bill like the last one, it is never going to make it through the Senate" (p. C-35).

Brown also felt that even with a "Triple-E" Senate, the CF-18 decision might have been made. However, a lot of Western Senators would have said that if the interests of Winnipeg were again overridden, a price would have to be paid. They would harden their position on bills affecting Western interests (p. C-36).

[28]Peter McCormick, Ernest C. Manning, and Gordon Gibson, Regional Representation: The Canadian Partnership (Calgary: Canada West Foundation, 1981), pp. 124-125.

[29]Alberta, Legislative Assembly, Select Special Committee on Senate Reform, Report: Strengthening Canada - Reform of Canada's Senate (Edmonton: Plains Publishing, 1985), pp. 33-34.

[30]Government of Newfoundland and Labrador, Constitutional Proposal: An Alternative to the Meech Lake Accord (St. John's Nfld?: Queen's Printer, 1989), submitted to the First Ministers' Conference, 9 and 10 November 1989, pp. 16-17.

[31]Gordon Robertson, A House Divided: Meech Lake, Senate Reform and the Canadian Union (Halifax: Institute for Research on Public Policy, 1989), p. 42. Opposition in Quebec to a decrease in the province's proportional representation in the Senate surfaced during the First Ministers' meeting in June 1990. Premier Joseph Ghiz of Prince Edward Island proposed that if Senate Reform was not achieved within a specified period, the representation of the Western provinces and Newfoundland would be increased to 10 Senators each (up from six) and Prince Edward Island's would grow to five (up from four). There would be no change for the other Atlantic provinces (10 each) or for Ontario or Quebec (24 each). The angry reaction of "Quebec nationalists" to the possible drop in Quebec's proportional representation from 23 percent to 19 percent soon had Premier Robert Bourassa distancing himself from the Ghiz proposal. "Nationalists put Bourassa on defensive over Senate," Montreal Gazette, 7 June 1990, pp. A1-A2.

[32]The sub-issues raised by four proposals for an elected Senate are briefly reviewed in a chart found in Robertson, pp. 80-84.

[33]McCormick, Manning, and Gibson, pp. 103-138.

[34]Canada, Royal Commission on the Economic Union and Development Prospects for Canada (Donald S. Macdonald, Chair), Report, vol. 3 (Ottawa: Supply and Services Canada, 1985), pp. 86-92 and 389-391. The Report concluded that if the proposed changes to the Senate were not adopted within a reasonable time, "efforts should be made to reform the electoral system of the House of Commons to enhance regional representation" (p. 390).

[35]These comments were made by Senator Joyce Fairbairn at the May 1988 National Conference on Senate Reform. Fairbairn was asked to speak on the topic of maintaining the present Senate. Personally, she preferred an elected Senate. Proceedings of Conference, pp. 88-94.

[36]1990 Constitutional Agreement, part 2, in First Ministers' Meeting on the Constitution, "Final Communiqué," 9 June 1990.

[37]The Agreement did not incorporate the part of the New Brunswick Companion Resolution to the Meech Lake Accord regarding the Senate's powers and section 36 of the Constitution Act, 1982. Section 36 expresses a commitment to redressing regional disparities and to making equalization payments. New Brunswick proposed that every five years the Senate should carry out an assessment of the results achieved by governments and legislative bodies in relation to these commitments. New Brunswick, Legislative Assembly, Unrevised Journal, 51st Legislative Assembly, 3rd Session (21 March 1990): 22-23.

[38]Ontario, Legislative Assembly, Select Committee on Constitutional and Intergovernmental Affairs, Report on the 1990 Constitutional Agreement (Toronto: The Committee, 1990), p. 15.

[39]Ontario, Legislative Assembly, Select Committee on Constitutional and Intergovernmental Affairs, Hansard: Official Report of Debates, 34th Parliament, 2nd Session (13 June 1990): C-64. The witness was Ron Watts of the Institute of Intergovernmental Relations, Queen's University.

[40]Ibid. (14 June 1990): C-109. The speaker was Judy Rebick of the National Action Committee on the Status of Women (NAC).

[41]Ibid., p. C-110. The previous month Senator Lorna Marsden had recommended the creation of senatorial districts which would elect by proportional representation two members - one man and one woman. This formula would guarantee fifty-fifty representation by sex in the Senate. Senator Lorna Marsden, Brief [on Senate Reform] to the Ontario Select Committee on Constitutional and Intergovernmental Affairs, May 1990, p. 2.

[42]Select Committee on Constitutional and Intergovernmental Affairs, Report, p. 16.

[43]Ibid., p. 20.

[44]Ontario, Ministry of the Attorney General, Rethinking the Senate: A Discussion Paper (Toronto: The Ministry, 1990), p. 1.

[45]Ontario, Legislative Assembly, Votes and Proceedings, 34th Parliament, 2nd Session (20 December 1989): 790. A technical amendment was made to the terms of reference on March 20, 1990. This amendment required the agreement of the House Leader and the Chief Whip of each party in order for the Committee to meet concurrently with the House. See Votes and Proceedings (20 March 1990): 842.

[46]In alphabetical order, the witnesses who appeared before the Committee in Ottawa were: Mark Audcent, Assistant Law Clerk and Parliamentary Counsel to the Senate; Senator Norman Atkins; Gordon Barnhart, Clerk of the Senate; Senator Gérald Beaudoin; the Hon. Eugene Forsey; Senator Allan MacEachen; Senator Lowell Murray; the Hon. Gordon Robertson; Senator Duff Roblin; and Senator Arthur Tremblay. The Toronto witnesses were: Bert Brown, chairman of the Canadian Committee for a Triple E Senate; Ramsay Cook, York University; David Elton, President, Canada West Foundation; C.E.S. Franks, Queen's University; Roger Gibbins, University of Calgary; Peter Hogg, Osgoode Hall Law School, York University; Desmond Morton, University of Toronto; Peter Russell, University of Toronto; Donald Smiley, York University; Ronald Watts, Queen's University; and John Whyte, Queen's University. Written submissions were received from David Baugh, Red Deer College; Thomas Courchene, Queen's University; Senator Lorna Marsden; and Senator Richard Stanbury.

[47]Ontario, Legislative Assembly, Votes and Proceedings, 34th Parliament, 2nd Session (28 June 1990): 1581.

[48]Select Committee on Constitutional and Intergovernmental Affairs, Report on the 1990 Constitutional Agreement, p. 14.

[49]Ontario, Legislative Assembly, Select Committee on Constitutional Reform, Report on the Constitution Amendment 1987 (Toronto: The Committee, 1988), pp. 4-7, 42-45, and 47-48.

[50]Ontario, Legislative Assembly, Hansard: Official Report of Debates, 34th Parliament, 2nd Session (25 June 1990): 1916-1917.

[51]"Meech killed future Senate votes, Getty says," Edmonton Journal, 26 June 1990, p. A1.

[52]Bourassa's address is reproduced in Globe and Mail, 25 June 1990, p. A13.

[53]The Prime Minister's address appears in Globe and Mail, 25 June 1990, p. A13.

[54]"Ottawa will treat Quebec as distinct. Murray says," Toronto Star, 24 June 1990, p. A15.

[55]S.B.C. 1990, c. 70. The letter is reproduced in British Columbia, Legislative Assembly, Hansard: Official Report of Debates, 34th Parliament, 4th Session (19 July 1990): 11244.

[56]"Senate's big brush with democracy," Globe and Mail, 13 October 1990, p. D1.

[57]"Buchanan breathes life into crusade for Senate reform," Globe and Mail, 14 September 1990, p. A4.

[58]Manitoba, Legislative Assembly, Hansard: Debates and Proceedings, 35th Legislature, 1st Session (11 October 1990): 8.

[59]Canada, Parliament, House of Commons, Debates: Official Report, 34th Parliament, 2nd Session (1 November 1990): 15006. During his speech, Mulroney referred to the constitutional commissions which had been established in Quebec, Alberta, and New Brunswick. Other provinces, he said, were planning to set up commissions as well. "Our initiative will complement not compete with these undertakings . . . ." p. 15008.

[60]Ibid., p. 15009. The formal terms of reference of the Citizens' Forum on Canada's Future are found in P.C. 1990-2347.

UPDATE, October 1992, taking account
of the Charlottetown Agreement

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INTRODUCTION

The purpose of this update is to briefly summarize some of the developments in the area of Senate reform since the release of the Current Issue Paper in November 1990. The focus is upon developments in Ontario -- in particular, the Report of the Legislature's Confederation Committee and a private member's resolution on the abolition of the Senate -- plus the constitutional agreement reached in Charlottetown on August 28, 1992.

POST-MEECH DEVELOPMENTS IN ONTARIO

Report of the Select Committee on Ontario in Confederation

In its *Final Report* of February 1992, the Select Committee on Ontario in Confederation pointed out that during its entire consultation process -- whether it be the Committee hearings, its meetings with legislators in other jurisdictions, or the special Ontario in Confederation Conference the Committee organized -- there was virtually unanimous agreement that the Senate should not continue in its current form. After assessing whether or not there should even be a second chamber of Parliament, the Committee concluded that abolition was not a practical or realistic option at this time. Accordingly, it recommended that:

> The Senate should be replaced by a new second chamber of Parliament whose mandate would include the effective representation of provincial and territorial interests in national decision-making.[1]

The Committee strongly felt, however, that the House of Commons had to remain the sole confidence chamber in Parliament. It did not wish legislative defeat in the second chamber to lead to the resignation of the government.

The Committee's recommendations addressing the three key issues of selection, representation and powers are outlined below.

Selection

The Committee believed that a second chamber had to be an elected body; otherwise the goals of democratic legitimacy and accountability to the people of Canada would not be met. After considering various electoral models, it concluded that members could be elected in one of two ways: (a) directly in a separate election to be held in conjunction with a provincial or territorial election; or (b) indirectly under a system of proportional representation based on provincial or territorial election results. The latter system would contain the following components:

- Voters would continue to cast ballots in provincial and territorial elections as at present;
- Seats in the second chamber would be allocated in proportion to the popular vote received in the province or territory by those parties contesting the election in question; and
- The parties would then choose the individuals who would fill these seats.

Representation

The Committee agreed with those who advocated a more equitable distribution of seats in a new second chamber. But did its support for "equatability" extend to the point of "equal" provincial representation? Various objections to "equality" were highlighted; however, "equality" might still be possible if the second chamber's powers were adjusted in a particular way. Thus, as far as the Committee was concerned, the issues of representation and powers were very closely linked. On the question of "equality," the *Report* reads as follows:

> We have considered various objections to the concept of "equality" in this new chamber -- for instance, that the concept does not adequately take into account the nearly 80-fold difference in provincial populations, nor the fact that Ontario has over one-third of Canada's population. Another concern is that it is not realistic to expect that Quebec, with its enormous proportion of the French-speaking population of the country, could accept a reduction to 10% of the second chamber's membership.

> However, if the second chamber's powers are changed in the way we recommend, then it is possible that a more equitable distribution of seats might indeed extend to "equal."[2]

The Committee recognized that on the issue of representation some witnesses and Conference delegates had challenged the traditional *geographic* perspective. In particular, they had favoured an extension of the second chamber's representational role beyond the representation of provinces, territories, or regions; they wished that role to encompass what some termed "communities of interest" -- that is, women, Aboriginal peoples, linguistic minorities, persons with disabilities, visible minorities, and ethnocultural groups.

The Committee did not make any recommendation in this area, stating that "whether or not the second chamber should perform this kind of function requires further study."[3] There was also the question as to how, on a practical level, such representation might be achieved.[4] The Committee, however, did consider the issue of guaranteed Aboriginal representation in legislatures as a separate matter. Earlier in the *Report* in the chapter on Aboriginal issues, it had referred to the lack of consensus among Aboriginal and non-Aboriginal people on the concept of guaranteed seats. At this time, the Committee believed that the top priority of other Canadians should be to listen to the stated needs of Aboriginal people. It continued:

> At the moment, the recognition of the inherent right to self-government is their highest priority. However, it may be that in the future their needs would be met by greater participation in the institutions which make policy for other Canadians.[5]

Powers

The Committee's proposals on powers distinguished between bills concerning shared-cost programs and all other bills. In the case of legislation introducing or changing shared-cost programs in areas of exclusive provincial jurisdiction, the second chamber would have an absolute veto over bills passed by the House of Commons. However,

if another recommendation of the Committee on shared-cost programs was implemented, ensuring that the provinces would have sufficient power over these programs, there would be no need for the granting of such a veto. This other recommendation stipulated, in part, that the federal government should not introduce or change shared-cost programs in areas of exclusive provincial jurisdiction without the approval of at least seven provinces with 50 percent of the population.

In the case of all other legislation, the second chamber would have a suspensive veto whereby it could delay, but not defeat, a bill. This veto would work in conjunction with possible changes to the division of powers and vary in length according to the nature of the bill in question. For instance, the duration of the veto would be longer if the bill passed by the Commons fell under the category of concurrency with provincial, as opposed to federal, paramountcy.

The Committee further recommended that a standing joint second chamber - House of Commons committee could be established to monitor carefully the fulfilment of national standards under an enhanced s. 36 of the *Constitution Act, 1982*. (The Committee had previously proposed that the concept of a Social Charter should be embodied in an expanded s. 36.)

Private Member's Resolution

In July 1992 the Ontario Legislature debated a private member's resolution sponsored by Norman Sterling, MPP, which stated:

> That, in the opinion of this House, the Senate of Canada should be abolished.

The debate took place two weeks after an agreement had been reached on Senate reform at the multilateral meetings on the Constitution in Ottawa (hereafter cited as the "July Agreement"). It appears to be somewhat unclear as to whether members were voting (a) on the Senate provisions in that agreement; (b) on the need for a second chamber; or (c) simply on the Senate as it is now constituted. Members

seemed to differ in their interpretation of the resolution.[6] In any event, the resolution was adopted by a margin of 27 to 18. The breakdown by party was as follows:

Yes	*No*
NDP - 15	NDP - 17
LIB - 7	PC - 1
PC - 5	

CHARLOTTETOWN AGREEMENT

The Charlottetown *Consensus Report on the Constitution* (the "Charlottetown Agreement") contains extensive provisions on the Senate, which should be read together with the proposed reforms to the House of Commons. The changes to both Houses of Parliament are discussed below.

Senate

Selection

The Charlottetown Agreement provides that Senators should be elected in one of two ways: either (a) by the population of the provinces and territories or (b) by the members of their provincial or territorial legislative assemblies. Such elections would take place at the same time as elections to the House of Commons.

Federal legislation would govern the elections, subject among other things to the above provisions on the method and timing of the election. Thus, for instance, it seems that a federal statute could prescribe a system of proportional representation for those provinces and territories choosing the option of direct election (item 'a' above). The Agreement also states that the federal legislation "would be sufficiently flexible to allow provinces and territories to provide for gender equality in the composition of the Senate."[7] Ontario is one of the provinces which has expressed a commitment to such equality.[8]

The July Agreement had provided for only one method of election -- direct election by the people of Canada. In addition, it had stipulated that Senators should be elected by proportional representation instead of by the "first-past-the-post" system currently used in elections to the House of Commons and the provincial legislatures. Furthermore, the electoral system "should be designed to reflect the diversity of Canada's population notably taking account of gender equality."[9]

From a historical perspective, the option of legislators selecting Senators is not new. (See CIP #113, pp. 6-8.) In 1980, for instance, the Ontario Legislature's Select Committee on Constitutional Reform recommended that half the membership of the Senate from any particular province be chosen by the House of Commons after a federal general election. The other half would be selected by the provincial legislature, following a general election in the province. In each case, seats would generally be allocated in proportion to the popular vote received in the province by the various parties. The Charlottetown Agreement attaches no such conditions to the election of Senators by legislatures. As well, it does not give the House of Commons the option of electing Senators.

During the week prior to the Charlottetown meeting, Quebec indicated its preference for the election of Senators by the National Assembly.[10]

Representation

Initially, the Senate would have a total membership of 62 Senators -- a reduction of 22 Senators from the July Agreement. Based on the principle of an equal Senate, each province would be entitled to six Senators and there would be one Senator from each territory. In the case of provincehood for the territories, any increase in their representation in the Senate would require the unanimous consent of all provinces and the federal government.[11]

The Charlottetown Agreement furthermore provides for guaranteed Aboriginal seats in the Senate, which would be additional to the provincial and territorial seats.

Aboriginal Senators would have the same role and powers as other Senators, with a possible double majority power in relation to certain matters materially affecting Aboriginal people. Such matters might thus require the approval of a majority of the Senate and a majority of the Aboriginal Senators. The Agreement notes that "these issues and other details relating to Aboriginal representation in the Senate (numbers, distribution, method of selection) will be discussed further by governments and the representatives of the Aboriginal peoples in the early autumn of 1992."[12]

Powers

Legislation

The Senate's legislative powers would involve a combination of absolute and suspensive vetoes and joint sittings with the House of Commons. Because the Senate would not be a confidence chamber, the exercise of its absolute veto (under the circumstances defined below) to defeat government-sponsored legislation would not require the government's resignation.

There would be four categories of legislation:

- Revenue and expenditure bills ("Supply bills");
- Legislation materially affecting the French language or French culture;
- Bills involving fundamental tax policy changes directly related to natural resources; and
- Ordinary legislation (any bill not falling into one of the first three categories).

With the exception of revenue and expenditure bills, any bills passed by the House of Commons would have to be disposed of by the Senate within thirty sitting days of the Commons.

Revenue and expenditure bills

By way of explanation, the Charlottetown Agreement states that:

> In order to preserve Canada's parliamentary traditions, the Senate should not be able to block the routine flow of legislation relating to taxation, borrowing and appropriation.[13]

Accordingly, revenue and expenditure bills would be subject to a 30 calendar-day suspensive veto. If the bill was defeated or amended by the Senate within this period, it could be repassed by a majority vote in the House of Commons on a resolution.

This category of "supply bills" would be defined as only those matters involving borrowing, the raising of revenue, and appropriation, plus matters subordinate to these issues. The definition would exclude fundamental policy changes to the tax system, such as the Goods and Services Tax and the National Energy Program.[14]

Bills that materially affect the French language or French culture

Such bills would be subject to an absolute veto by the Senate. Thus, the Commons would not be able to override the defeat of a bill in this category by the Senate. In order to become law, these bills would require approval by a double majority -- that is, by a majority of Senators voting and by a majority of the Francophone Senators voting. (Note: The references in the Agreement to a "majority of Senators voting" exclude Senators who do not vote and should be contrasted with a "majority of the entire Senate.")

Bills involving fundamental tax policy changes directly related to natural resources

This is the other category of legislation where the Senate could exercise an absolute veto. These bills would be defeated if a majority of Senators voting cast their votes against them. The Agreement notes that the "precise definition" of this legislative category has not yet been determined.[15]

Ordinary legislation

If the Senate defeated or amended any other bill, a joint sitting process involving the entire Senate and House of Commons would be triggered. At this joint sitting, a simple majority vote would determine the outcome of the bill.

In contrast, the July Agreement had given the Senate an absolute veto power over ordinary legislation, but only if seventy percent of the Senators voting had opposed the bill in question. In the case of a sixty-to-seventy percent vote against the bill, a "reconciliation process" would have been invoked. If that process had failed, a joint sitting with the Commons would have been required.[16]

Currently, the Senate has the capacity to initiate bills, except for money bills. The Charlottetown Agreement would retain that power. A bill initiated and passed by the Senate would have to be disposed of by the Commons within a "reasonable time limit."[17] If the Commons amended or rejected the bill, the joint sitting process would be triggered automatically.

Constitutional Amendments

There would be no change to the Senate's powers over constitutional amendments. Thus, the Senate could delay a constitutional resolution by 180 days (but not kill it) and require the Commons to repass it. This suspensive veto came into play in June 1988 when the House of Commons overrode amendments by the Senate to the Meech Lake Accord.

Ratification of Appointments

The Senate would be empowered to ratify the appointment of the Governor of the Bank of Canada and "other key appointments" made by the federal government.[18] The actual appointments that would be subject to Senate ratification, including the heads of national cultural institutions and federal regulatory boards and agencies,

would be set out in specific federal legislation rather than the Constitution. However, the ratification of the Bank of Canada appointment would still be constitutionalized.

The Senate would have to deal with any proposed appointments within thirty sitting days of the Commons. An appointment would be rejected if a majority of Senators voting cast their votes against it.

There is no role assigned to the Senate in the ratification of appointments to the Supreme Court of Canada.

Monitoring the Social and Economic Union

As mentioned earlier, the Ontario Confederation Committee proposed that a joint second chamber - House of Commons committee could be established to monitor the fulfilment of national standards under an enhanced s. 36 of the *Constitution Act, 1982*. Although the Charlottetown Agreement does not create such a committee, it does call for a new constitutional provision, entitled the *Social and Economic Union*, with a monitoring mechanism to be determined by a First Minister's Conference. The Agreement does not say anything further about this mechanism (except that it will not be the courts).[19]

Eligibility for Cabinet

Senators would not be eligible for Cabinet posts.[20]

Amending Constitutional Provisions on the Senate

Currently, an amendment to the Constitution in relation to:

- the method of selecting Senators;
- provincial representation in the Senate;

- the powers of the Senate; and
- the residence qualifications of Senators

must be passed by the general amending formula, also known as the "7/50 formula." This formula requires approval of the amendment by the House of Commons and Senate (subject to the Commons override) and by the legislatures of at least two-thirds of the provinces having at least 50 percent of the population of Canada (less that of the territories).[21] The Charlottetown Agreement changes the amending formula so that:

> Amendments to provisions of the Constitution related to the Senate should require unanimous agreement of Parliament and the provincial legislatures, *once the current set of amendments related to Senate reform has come into effect*.[22] [emphasis added]

The Meech Lake Accord would also have changed the amending formula regarding these matters to one of unanimity.[23] It did not, however, provide for a comprehensive set of amendments to the Senate that would precede the new formula.

House of Commons

As described above, the Charlottetown Agreement changes the composition of the Senate to reflect the principle of the equality of the provinces. At the same time, it provides that:

> The composition of the House of Commons should be adjusted to better reflect the principle of representation by population.

Accordingly, it provides for an initial increase in the size of the House of Commons from 295 to 337 seats, to be made at the time Senate reform comes into effect. These additional 42 seats would be allocated as follows:

Ontario	18
Quebec	18
British Columbia	4
Alberta	2

(Note: For detailed statistics on the proposed composition of Parliament, see the Appendix to this paper.)

An additional special Canada-wide redistribution of seats would be conducted following the 1996 census. It would aim to ensure that, in the first subsequent general election, no province would have less than 95 percent of the House of Commons seats it would receive under strict representation-by-population. Consequently, Ontario and British Columbia would each be assigned three additional seats and Alberta two additional seats.[24]

The redistribution based on the 1996 census and every future redistribution would be governed by certain requirements, including:

> A guarantee that Quebec would be assigned no fewer than 25 percent of the seats in the House of Commons.[25]

Another provision on the composition of the House of Commons holds that the issue of Aboriginal representation should be pursued by Parliament, in consultation with representatives of the Aboriginal peoples. This process should start after the tabling of the final report of the House of Commons Committee studying the recommendations of the Royal Commission on Electoral Reform and Party Financing.[26]

With regard to the amending formula, future amendments affecting the House of Commons, including Quebec's 25 percent guarantee, would require unanimity.[27]

FOOTNOTES

[1] Ontario, Legislative Assembly, Select Committee on Ontario in Confederation, *Final Report* (Toronto: The Committee, 1992), p. 65, Recommendation 24.

[2] Ibid., p. 62.

[3] Ibid., p. 58.

[4] Ibid.

[5] Ibid., p. 30.

[6] See Ontario, Legislative Assembly, *Hansard: Official Report of Debates*, 35th Parliament, 2nd Session (23 July 1992): 2289-2296 and 2304.

[7] Multilateral Meetings on the Constitution, *Consensus Report on the Constitution*, Final Text, Charlottetown (28 August 1992), item 7.

[8] See, for example, "Women to get half of Ontario's seats in Senate, Rae says," *Financial Post*, 28 August 1992, p. 39 and "At some point behind closed doors last month . . ." *Toronto Star*, 6 September 1992, pp. A1 and A16.

[9] Multilateral Meetings on the Constitution, *Status Report* (16 July 1992 -- results as of 7 July 1992), item 7.

[10] See, for example, "Senate logjam breaking," *Globe and Mail*, 19 August 1992, pp. A1 and A5.

[11] Multilateral Meetings, *Consensus Report*, items 8 and 58.

[12] Ibid., item 9.

[13] Ibid., item 13.

[14] Ibid.

[15] Ibid., item 12.

[16] Multilateral Meetings, *Status Report*, item 12.

[17] Multilateral Meetings, *Consensus Report*, item 12.

[18] Ibid., item 15.

[19] Ibid., item 4.

[20] Ibid., item 16.

[21] *Constitution Act, 1982* [en. by *Canada Act, 1982* (U.K.), 1982, c. 11], ss. 38(1) and 42(1).

[22] Multilateral Meetings, *Consensus Report*, item 57.

[23] *Constitution Amendment, 1987*, s. 9.

[24] The *Consensus Report* states that "as a result of this special adjustment, no province or territory will lose seats, nor will a province or territory which has achieved full representation-by-population have a smaller share of House of Commons seats than its share of the total population in the 1996 census" (item 21).

[25] Multilateral Meetings, *Consensus Report*, item 21(a).

[26] Ibid., item 22.

[27] Ibid., item 57.

APPENDIX
PROPOSED CHANGES TO PARLIAMENT

TABLE 1

HOUSE OF COMMONS SEATS

	Number of Seats		% of total	
Province/Territory	Proposed	Current	Proposed	Current
British Columbia	36	32	10.7	10.8
Alberta	28	26	8.3	8.8
Saskatchewan	14	14	4.2	4.7
Manitoba	14	14	4.2	4.7
Ontario	117	99	34.7	33.6
Quebec	93	75	27.6	25.4
New Brunswick	10	10	3.0	3.4
Nova Scotia	11	11	3.3	3.7
Prince Edward Island	4	4	1.2	1.4
Newfoundland	7	7	2.1	2.4
Yukon	1	1	0.3	0.3
Northwest Territories	2	2	0.6	0.7
TOTAL	337	295	100	100

Source: Diana Clifford and Bernard Bennell, "Premiers achieve breakthrough on proposed changes to Parliament," *Globe and Mail*, 20 August 1992, p. A4.

TABLE 2

SENATE SEATS

	Number of seats		% of total	
Province/Territory	Proposed	Current	Proposed	Current
British Columbia	6	6	9.7	5.8
Alberta	6	6	9.7	5.8
Saskatchewan	6	6	9.7	5.8
Manitoba	6	6	9.7	5.8
Ontario	6	24	9.7	23.1
Quebec	6	24	9.7	23.1
New Brunswick	6	10	9.7	9.6
Nova Scotia	6	10	9.7	9.6
Prince Edward Island	6	4	9.7	3.8
Newfoundland	6	6	9.7	5.8
Yukon	1	1	1.6	1.0
Northwest Territories	1	1	1.6	1.0
TOTAL	62	104	100	100

Source: Diana Clifford and Bernard Bennell, "Premiers achieve breakthrough on proposed changes to Parliament," *Globe and Mail*, 20 August 1992, p. A4.

TABLE 3

SEATS IN PARLIAMENT (HOUSE OF COMMONS PLUS SENATE)

	Number of seats		% of total	
Province/Territory	Proposed	Current	Proposed	Current
British Columbia	42	38	10.5	9.5
Alberta	34	32	8.5	8.0
Saskatchewan	20	20	5.0	5.0
Manitoba	20	20	5.0	5.0
Ontario	123	123	30.8	30.8
Quebec	99	99	24.8	24.8
New Brunswick	16	20	4.0	5.0
Nova Scotia	17	21	4.3	5.3
Prince Edward Island	10	8	2.5	2.0
Newfoundland	13	13	3.3	3.3
Yukon	2	2	0.5	0.5
Northwest Territories	3	3	0.8	0.8
TOTAL	399	399	100	100

Source: Diana Clifford and Bernard Bennell, "Premiers achieve breakthrough on proposed changes to Parliament," *Globe and Mail*, 20 August 1992, p. A4.

TABLE 4

POPULATION PER SEAT IN HOUSE OF COMMONS

	Population	% of population	Population per seat in House of Commons	
Province/Territory			Proposed	Current
British Columbia	3,290,500	12.0	91,403	102,828
Alberta	2,558,200	9.4	91,364	98,392
Saskatchewan	992,900	3.6	70,921	70,921
Manitoba	1,095,000	4.0	78,214	78,214
Ontario	10,062,000	36.8	86,000	101,636
Quebec	6,912,300	25.3	74,326	92,164
New Brunswick	727,700	2.7	72,770	72,770
Nova Scotia	906,800	3.3	82,436	82,436
Prince Edward Island	130,100	0.5	32,525	32,525
Newfoundland	575,100	2.1	82,157	82,157
Yukon	27,600	0.1	27,600	27,600
Northwest Territories	55,900	0.2	27,950	27,950
TOTAL	27,334,100			

Source: Diana Clifford and Bernard Bennell, "Premiers achieve breakthrough on proposed changes to Parliament," *Globe and Mail*, 20 August 1992, p. A4.

TABLE 5

PROPOSED HOUSE OF COMMONS AND EXTENT OF DEVIATION FROM REPRESENTATION BY POPULATION

Province/Territory	Proposed Seats	Seats Distributed on Full Rep. by Pop. Basis	Deviation from Rep. by Pop. in Proposed Commons
British Columbia	36	40	-4
Alberta	28	32	-4
Saskatchewan	14	12	+2
Manitoba	14	13	+1
Ontario	117	124	-7
Quebec	93	85	+8
New Brunswick	10	9	+1
Nova Scotia	11	11	0
Prince Edward Island	4	2	+2
Newfoundland	7	7	0
Yukon	1	1	0
Northwest Territories	2	1	+1
TOTAL	337	337	

Source: David Johnson, "The New Constitutional Deal at a Glance," *Canada Watch* 1:2 (September 1992):20.